FILE COPY

FILED
JAN 20 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 388

LETCHER SPICER BY SAM SPICER, Guardian and Committee, - - - - - - - - - Petitioner

versus

J. BRYAN SMITH, Special Deputy Banking Commissioner and Liquidating Agent of Hargis Bank and Trust Company, - - - - - - - - Respondent.

BRIEF FOR RESPONDENT

JESSE I. MILLER,
HENRY L. SPENCER,
Counsel for Respondent.

INDEX

Statement of facts ..... Pages 1 to 3

Construction of section 3466 Revised Statutes of the United States .... 3 to 9

"Whenever any person indebted to the United States is insolvent * * * * *the debt due the United States shall be first satisfied." (Section 3466 Revised Statutes.)

The Hargis Bank and Trust Company is not and was not indebted to the United States ..... 3 and 7

Construction of similar section 4747 Revised Statutes of the United States (38 U. S. C. A. Sec. 54.) ..... 4 to 5

"It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to wit, when due or to become due."

"The exemption provided by the act protects the fund only while in the course of transmission to the pensioner. When the money has been paid to him it has inured wholly to his benefit, and it is liable to seizure as opportunity presents itself." McIntosh v. Aubrey 185 U. S. 122..... 4

The protection extended under the terms of the Statute is to be an undelivered sum of money, applying to money due or to become due and not to money paid or in possession. Cranz v. White 27 Kans. 319, 41 Am. 408 ..... 4 to 5

"When money received as a pension has come into the actual possession and control of the pensioner, then it has inured wholly to his benefit and is no longer exempt."

Rozelle vs. Rhodes 116 Pa. 129 Atl. 160; Holmes vs. Tallada, 125 Pa. 133, 3 L. R. A. 219 Atl. 238; Am. & Eng. Enc. Law

Pages

P. 294; Spelman vs. Aldrick, 126 Mass. 113: Friend v. Garcelon, 77 Me. 25 52 Am. Rep. 739; Crane v. Linneus, 77 Me. 59; State Jardin, Prosecutor v. Fairton Sav. Fund & Bldg. Asso. 44 N. J. L. 376; Martin v. Hurlburt, 60 Vt. 363, 14 Atl. 649; Sims v. Walshman, 9 Ky. L. Rep. 912, 7 W. 557; Robinon v. Walker 82 Ky. 80, 56 Am. Rep. 878; Cranz v. White 27 Ky. 319, 41 Am. Rep. 408 ---------- 5 and 6

The intervention of a guardian does not leave pension funds still in the hands of the Government so that they are still payable or due to the ward as expressed by that section, so as to exempt the funds from assessment, execution, and taxation, but when paid to the guardian, the title and possession have both passed from the Government, hence the exemption provided for by section 454 no longer is applicable. 132 Kan. 223, 294, Pac. 915, 38 U. S. C. A. Sec. 454 ---------- 6

The exemption is to protect Veterans from claims of creditors, but did not give the soldier an advantage over his debtors, Price v. Society for Savings, 64 Conn. 326; Mobley v. Jackson 156 S. E. (Georgia) 23, 71 A. L. R. 1178 ---- 5

"For when paper is indorsed without restriction for a depositor and is at once passed to his credit, by the bank to which he delivers it, he becomes a creditor of the Bank." Douglas vs. Federal Reserve Bank 2171 U. S. 489; Burton vs. U. S. 196 U. S. 283 49 L. Ed. 482; Union Electric Steel Co. vs. Imperial Bank, 286 Fed. 857; General American Tank Car Corp. vs. Goree, 296 Fed. 32 ---------- 6 and 7

Argument ---------- 7 to 12

Summary ---------- 10 to 12

Opinion of the Kentucky Court of Appeals is logical and sound and is a correct exposition of the law ---------- 11 to 12

IN THE

Supreme Court of the United States

No. 388

LETCHER SPICER BY SAM SPICER, Guardian and Committee, - - - - - - - - - Petitioner

versus

J. BRYAN SMITH, Special Deputy Banking Commissioner and Liquidating Agent of Hargis Bank and Trust Company, - - - - - - - - Respondent.

BRIEF FOR RESPONDENT

On Writ of Certiorari to the Court of Appeals of Kentucky, to review a decision reversing a judgment of the Breathitt Circuit Court, decreeing a priority in favor of Petitioner on the assets of Hargis Bank and Trust Company in liquidation.

STATEMENT OF FACTS

The facts admitted in the pleadings are as follows:

(a) Letcher Spicer, plaintiff below, was a World War veteran that had been adjudged to be mentally incompetent and permanently disable by service connected disabilities. The said veteran has been and is now in the Government Hospital at Chillicothe, Ohio. After being adjudged mentally incompetent, Sam

Spicer, was appointed by the Breathitt County Court, his committee, and on the 8th day of July, 1929, he executed bond, approved by the Breathitt County Court, with the Fidelity and Deposit Company of Maryland as his surety for the faithful performance of his duty. (See Tr. 2 & 9).

(b) On February 6th, 1930, the Hargis Bank and Trust Company, of Jackson, Kentucky, closed its doors and went into the possession of the Banking Commission of Kentucky for liquidation. The respondent J. Bryan Smith was appointed Special Deputy Banking Commissioner and Liquidating Agent, and took charge of said Bank and all its assets. (See Tr. 2).

(c) On the day the Bank went into the hands of the Banking Commission of Kentucky, Sam Spicer, Committee for Letcher Spicer, had on time deposit in said Bank, $6,070.80, bearing interest at the rate of 5 per cent per annum. This money had been paid in monthly installments by the Government of the United States to Sam Spicer, committee, for Letcher Spicer. He in turn deposited it in the Hargis Bank and Trust Company, at various times, in the name of Sam Spicer, Guardian. (See Tr. 2 & 8).

(d) It is admitted by the pleadings that at the time the Hargis Bank and Trust Company closed its doors it was insolvent. It is admitted by the pleadings that when final liquidation is had its assets will pay the depositors about 50% of their deposits. (See ans. Tr. 7.)

(e) It is also admitted by the pleadings that the $6,070.80, which was on deposit in the Hargis Bank and Trust Company in the name of Sam Spicer, guardian, was money paid to him by the United States Government as War Risk Insurance and disability compensation. (See Tr. 2).

The Petitioner by his cause of action in the Breathitt Circuit Court, sought a preference over other depositors on the assets of

Hargis Bank and Trust Company, in liquidation, under section 3466 of the Revised Statutes of the United States. The Breathitt Circuit Court, adjudged petitioner the preference he sought. An appeal was taken from that judgment to the Court of Appeals of Kentucky by the Liquidating Agent and the judgment of the lower court was reversed by the Court of Appeals by a decision recorded in 244 Ky. 68 50 S. W. 2nd. 64. See Tr. 12 to 17).

A Writ of Certiorari having been granted petitioner, this action is before this court to review the decision of the Court of Appeals of Kentucky.

CONSTRUCTION OF SECTION 3466

The question for determination in this case necessitates a construction of section 3466, Revised Statutes of the United States. It is contended by the Petitioner that in order to properly construe that section a consideration must be made of the entire World War Veterans act, approved June 7th, 1924, and amendments thereto. The entire act having been duly considered and discussed in brief resisting writ of certiorari, we will eliminate from this brief a review of the whole act, and discuss only the sections relied upon by petitioner and authorities construing it. (Section 3466.)

> "Sec. 3466, Priority of debts due United States established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executor or administrators, is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding,

concealed or absent debtor are attached by process of law as to cases in which an act of bankruptcy is committed."

A similar question to the one in the case at bar has been presented to this Court in a construction of 4747, Revised Statutes of the United States, passed March 3rd, 1873 (38 U. S. C. A. Sec. 54), and the reasons advanced by the court in a construction of that act apply equally in a construction of section 3466.

(Section 4747:)

> "No sums of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the Pension Office or any officer or agent therefor,—But shall inure wholly to the benefit of such pensioner."

This Court in construing this section said:

> "It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be **exempt in one situation,** to wit, when 'due or to become due.' "
>
> "The exemption provided by the act protects the fund only while in the course of transmission to the pensioner. When the money has been paid to him it has inured wholly to his benefit, and it is liable to seizure as opportunity presents itself." McIntosh vs. Aubrey 185 U. S. 122.

The supreme Court of Kansas in an opinion rendered by Mr. Justis Brewer, construing a similar section to section 4747, made its ruling in substance as follows:

> The protection extended under the terms of the statute is to be an undelivered sum of money, applying

to money due or to become due and not to money paid or in possession." Cranz vs. White, 27 Kans. 319; 41 Am. R. 408.

In the case of Price vs. Society for Savings, 64 Conn. 326 (1894), the court held that pension monies deposited in a savings bank were not subject to attachment by a creditor, but here we are not dealing with pension monies in the strict sense of the term, nor are we dealing with an attaching creditor.

In the instant case the veteran is seeking to make his debtor an insurer of the value of his money.

> Jackson, a confederate soldier, drew a pension from the State of Georgia, under a law which exempted pensions from garnishment and other legal processes. He deposited one hundred twenty-five dollars in a bank and took a certificate of deposit therefor. The bank knew the funds were pension monies. The Bank thereafter became insolvent and paid a fifteen per cent dividend.
>
> Upon a petition to have a certificate of deposit declared a prior lien, on the theory that it was pension money, it was held that monies were exempted from the claims of creditors of the veteran, but did not give the soldier a preferred claim over his debtor's assets.
>
> Mobley vs. Jackson, (1930) 156 S. E. Georgia, 23 71 A. L. R. 1178.

When money received as a pension has come into the actual possession and control of the pensioner, then it has "inured wholly" to his benefit, and is no longer exempt. Rozelle v. Rhodes, 116 Pa. 129, 9 Atl. 160. Holmes v. Tallada, 125 Pa. 133, 3 L. R. A. 219, 17 Atl. 238; 18 Am. & Eng. Enc. Law. p. 294; Spelman v. Aldrick, 126 Mass. 113; Friend v. Garcelon, 77 Me. 25 52 Am. Rep. 739;

Crane v. Linneus, 77 Me. 59; State, Jardin, Presecutor, v. Fairton Sav. Fund & Bldg. Asso. 44 N. J. L. 376; Martin v. Hurlburt, 60 vt. 364, 14 Atl. 649; Sims v. Walsham, 9 Ky. L. Rep. 912, 7 S. W. 557; Robinon v. Walker, 82 Ky. 60, 56 Am. Rep. 878; Cranz v. White 27 Ky. 319, 41 Am. Rep. 408.

The supreme court of the State of Kansas, construing the effect of 38 U. S. C. A. section 454, (cited by Petitioner), as it relates to civil war pension funds, ruled in substance as follows:

> The intervention of a guardian does not leave pension funds still in the hands of the Government, so that they are still **payable or due** to the ward as expressed by that section so as to exempt the funds from assessment, execution, and taxation, but, when paid to the guardian, the title and possession have both passed from the Government, hence the exemption provided for by section 454 no longer is applicable.
>
> 132 Kan. 223, 294, Pac. 915.

It can be gleaned from all of the various sections of the Revised Statutes that the purpose of Congress was to protect the pensioner, or the person to whom a pension was to be paid, from his creditors before payment was made by the government. There can be no inference drawn from any of the sections that the pensioner was to have a priority or advantage over his debtors.

When a person deposits money in a bank, the depositor is a creditor of the Bank and the bank is his debtor. This court has established that rule by a decision in which it said:

> "For when paper is indorsed without restriction by a depositor, and is at once passed to his credit, by the Bank to which he delivers it, he becomes a creditor of the Bank; The Bank becomes owner of the paper and in

making the collection is not the agent for the Depositor."

Douglas vs. Federal Reserve Bank 2171 U. S. 489; Burton vs. U. S. 196 U. S. 283, 49 L. ed. 482; Union Electric Steel Co. vs. Imperial Bank, 286 Fed. 857; General American Tank Car Corporation vs. Goree, 296 Fed. 32.

ARGUMENT

A consideration of section 3466, on which the petitioner solely relies for a preference will show what two questions must be determined.

FIRST:

Was the Hargis Bank and Trust Company at the time it closed indebted to the United States for the money on deposit in the name of Sam Spicer, Guardian?

SECOND:

Was Sam Spicer, Guardian for Letcher Spicer, the Agent of the Government or the agent of his ward?

Dealing with the first question we first note that section 3466 provides that whenever any person indebted to the United States is insolvent, whether he be dead or alive, the debt to the United States must first be paid and satisfied.

If the Hargis Bank and Trust Company was indebted to the United States for the money on deposit, in question, we reach the inevitable conclusion that plaintiff's petition presents no cause of action. We note from the caption of the petition that the United States is not a party to the suit. The guardian, Sam Spicer, does not bring the action as an officer, or agent of the United States, and the pleadings do not disclose that the United States is an any way concerned in the action. We are therefore forced to the conclusion that if Sam Spicer was holding the money of Letcher Spicer, as the Agent of the United States, his pleadings makes no

disclosure of that fact. Our deductions must therefore be carried on to the ultimate conclusion, that we have an individual suing for indebtedness due the United States. If that theory of the petitioner is true in fact, which respondent denies, the petition could state no cause of action for money due the United States.

Dealing with the second proposition we refer to the brief of petitioner and quote from it as follows:

> "Money paid by the government under the statute, in question, is in the nature of a pension. The funds are created by the same supreme power, the Government."

If that statement be true, then is the Guardian the Agent of the Ward? In the case at bar and other similar cases where the person to whom pension money is due from the Government, is an incompetent, the government must have some person or firm to whom to pay the money. The incompetent or the ward must have some person or firm to transact his business and to care for him. The Government requires that incompetents have guardians or committees appointed by the local government where they reside, to receive the money from it for them. The pension money will not be paid until the appointment is made and the guardian or committee has executed bond for the faithful performance of his duties in disbursing and expending the money for the benefit of his ward. In the case at bar, Sam Spicer was appointed by the Breathitt County Court, committee or guardian for Letcher Spicer. He executed a bond in the penal sum of $20,000.00 with the Fidelity and Deposit Company of Maryland, as his surety, for the faithful performance of his duties to his ward. That bond is of record in the county court clerk's office of Breathitt County, Kentucky, in full force, effect and virtue.

The Guardian or Committee, has charge of the Ward's person. It is his duty to see that the ward is properly fed, properly clothed and properly provided for and supported. He contracts for his

ward's needs, and pays his bills. The Guardian or Committee is required to make annual reports to the County Court and itemize his receipts and disbursements for his ward. The county court has power to approve or disapprove his annual settlements. It has power to surcharge his settlements. It has power to remove him for dereliction of duty to his ward. It has power to increase or decrease the bond or to require additional surety on the bond for the protection of the ward.

If the Committee or Guardian is the Agent of the United States Government, why all of this proceeding in the local county court? Why any appointment by the County Court? Why any bond required in the County Court? If he be the Agent of the United States Government why should not the law provide that the United States Government appoint the guardian or committee and receive and approve a bond for him? We are therefore forced to the inevitable conclusion that the guardian or committee is acting in every capacity for his ward. He is not only the Agent to receive and disburse his money, but he is the agent of the ward with personal supervision of the ward, and is in charge of all the ward's property, business and affairs.

Since Attorney for petitioner admits that there is no difference in money paid to pensioners and other government money paid to persons, we insist that this court has already decided the question in the case at bar, by its decision in McIntosh vs. Aubrey 185 U. S. 122, in which this court said:

> "It is only to be **exempt in one situation** to wit: when due or to become due. The exemption provided by the act protects the fund only while in the course of transmission to the pensioner, when the money has been paid to him, it has inured wholly to his benefit and is liable to seizure, as opportunity presents itself."

The writer of this brief could not, and would not attempt to command stronger language drawing the distinction as to when the money is exempt. It is common reason that the Government has no interest in how the pensioner or soldier spends the money after it has been paid over to him. It is further common reason to say that the Guardian, or committee who has charge of the very person of the ward together with all of his property, is the Agent of that ward, receiving the funds for him. The possession of the funds by the guardian or committee is the possession of his ward.

While it is to be admitted that some of the States have decided in favor of petitioner's contention, equally as many States, if not more, have upheld the ruling of this court in the above cited case.

We contend that section 4747 has stronger language for the exemption of money, when applied to the admitted facts in the case at bar, than section 3466 relied upon by petitioner. Under 3466 before any preference or priority or exemption could apply, it must first be determined that it is money due the United States. The petitioner's cause of action fails upon that one point.

SUMMARY

We contend that a guardian is an agent for his ward, and a payment to him of money, is a payment to his ward. He is appointed by the county court in the county where the ward resides. The court that appoints him requires of him a good and sufficient bond with sound and safe sureties to protect his ward from any loss or misapplication, that is made of the money.

It is admitted that Sam Spicer, guardian or committee has executed two bonds, one on September 29th, 1919, with personal sureties, the other one July 8th, 1929, over six months before the Hargis Bank and Trust Company

closed, in the penal sum of $20,000.00, with the Fidelity and Deposit Company of Maryland as his surety.

It is plain to be seen that the Guardian or Committee, Sam Spicer, in the case at bar is under bond for the money that he had on deposit in the Hargis Bank and Trust Company, at the time it closed in the sum of $6,070.80. The surety of his bond was approved as being good by the Breathitt County Court, and the surety on the bond is good. Sam Spicer drew this money from the government as the guardian and committee of the incompetent veteran, Letcher Spicer, after he had executed a good bond. He had a right to deposit the money in any bank he desired. He did deposit the money in the Hargis Bank and Trust Company, in the same manner as any of the other depositors. As far as the assets of the Bank are concerned he stands in the same position as any other depositor, and is entitled to file his claim as a common creditor and to receive the same percentage of his claim, he then has a good bond with good surety upon which the veteran, Letcher Spicer, may recover the balance of his money. He cannot lose any portion of his money and it certainly would be both unjust and unfair to the rest of the depositors of the Bank to allow him a preferred claim against the assets of the bank and lessen the percentage of their deposits, when he has full protection for all his money under the bond.

We find in the decisions of the highest courts in the many states much conflict on their rulings on certain principles of law. There are conflicting opinions on the questions presented in the case at bar, and that question should be determined by this court in order that the several states may rule in uniformity on the question.

We believe that the decision of the Court of Appeals of Kentucky is based upon logic and sound reason and is a true exposition

of the law on that question.

We therefore conclude that the statutes of the United States cited by petitioner do not authorize a construction contrary to the decision of the Kentucky Court of Appeals, and that the petitioner is entitled to no preference on the assets of the Hargis Bank and Trust Company, and is a common creditor on an equal basis with all of its many other depositors.

Respectfully submitted.

JESSE I. MILLER,
HENRY L. SPENCER,
Counsel for Respondent.